

The Planning Board for the Town of Derry held a public hearing on Wednesday, March 19, 2008 at 7:00 p.m. at the Derry Municipal Center (3<sup>rd</sup> Floor) located at 14 Manning Street in Derry, New Hampshire.

Members present: Virginia Roach, Chair; Neal Ochs, Vice Chair; David Granese, Secretary; Brian Chirichiello, Council Representative; Randy Chase, Administrative Representative; Jim MacEachern (7:03), David Nelson and Ann Evans.

Alternates present: Jan Choiniere

Absent: Gary Stenhouse, [Richard Tripp](#)

Also present: George Sioras, Director of Community Development; Elizabeth Robidoux, Planning Clerk; Mark L'Heureux, Engineer, Derry Public Works; Wes Aspinwall, LLS, Edward Hebert Associates; Jim Lavelle, LLS, James Lavelle Associates; Todd Connors, Sublime Civil Consultants and various members of the public.

Chairman Roach called the meeting to order at 7:00 p.m., and began with a salute to the flag. She introduced the staff and members of the Board to those present; advised of emergency exits and the location of agendas.

**Escrow**

**LOC 08-07, Lampton Drive & Derby Road  
PID 06046**

The request is to renew the Letter of Credit No. 20001083, TD Bank North, previously known as number 83040023 and 0478537-4001. The new expiration date will be March 10, 2009.

Motion by Ochs, seconded by Nelson to renew the Letter of Credit held for Lampton Drive. The motion passed unanimously.

**LOC 08-08, Reed Asset Management  
PID 04065, 17 Gulf Road**

The request is to establish a Letter of Credit, held by The Haverhill Bank, in the amount of \$34,897.39 for Reed Asset Management, Parcel ID 04065.

Motion by Ochs, seconded by Nelson to establish the Letter of Credit, as presented. The motion passed unanimously.

**Minutes**

As no corrections or changes were noted, the minutes of the March 5, 2008 meeting were accepted as written. Mr. Chirichiello abstained.

**Correspondence**

Mr. Granese noted the following correspondence.

- The Manchester Chamber of Commerce is hosting That Green Thing, a symposium and exhibition for green products and services. This will be held at the Radisson in Manchester, on March 25, 2008 between 2:00 and 8:00 p.m.
- There will be a Planners Roundtable meeting on Thursday, March 27, 2008 from 6:30 to 8:00 p.m. RSVP by March 21, 2008.
- Copy of a letter to Barry Pearson of Enterprise Bank from the division of historic resources with regard to 47 Crystal Avenue.
- February 2008 edition of *Town and City*. A copy is available in the Community Development Office.

**Other Business***Request for Reconsideration – The Goddard School*

Mrs. Roach advised the Board has received a request from Attorney Greg Michael of Wiggin & Nourie, dated March 7, 2008, to reconsider a decision rendered by the Board on February 20, 2008, with respect to The Goddard School.

Ms. Evans said unless someone would like to reconsider she would make a motion to place this document in the Planning Board file. Mr. Nelson said that procedurally when a Board seeks to reconsider a decision, the prevailing side needs to make the initial motion. He voted yes, so he can't make such a motion. He has reviewed the letter and case law provided. The applicant has made a reasonable point that there were some issues that they did not have time to address and they think they can supply some new information that may sway some opinions. If the Board has a mind to hear additional data, he feels this would be permissible and appropriate.

Motion by Granese to hold a public hearing to reconsider the decision made on The Goddard School, seconded by Ochs. Discussion followed.
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Mr. Chirichello advised he would need to abstain from any vote on this matter. Mr. MacEachern asked for time to read the legal opinion provided by Town

Counsel. Mrs. Roach clarified that members voting on this application would be Evans, Nelson, Granese, Ochs, MacEachern, and Roach. Mr. Chase abstained on the original vote.

Mr. MacEachern commented it appears per Attorney Clark's letter that reconsidering the decision is an option if the prevailing side feels they made an error in the decision process. Does anyone on the prevailing side feel they made an error in their decision? The Board does not need to reconsider this matter and it may open Pandora's Box. Boards reconsider when new evidence is brought forth or the Board feels that in the decision making process they did something incorrectly or feel there is a need to listen more. That has been his experience on the Town Council. He is not sure that this Board did anything procedurally incorrect. He noted that he voted for the application. For the majority of the Board who voted to deny, reconsideration is something that has to be done with good thought or reason. Board's don't do this so it can be voted down. He would like to understand why there is a motion to reconsider. Did the Board feel there was not enough time to collect data? He thought there was and that the applicant did a good job in presenting their case to the Board. He would just like to know why before he votes on the motion.

Mr. Ochs asked for clarification. Does the Board need to make the motion so that it can be voted up or down? Mr. MacEachern said no. Mr. Ochs felt there had been due diligence to vote and that the Board had all the information it needed to make an informed decision. He cannot see there is any other information they can present that they could not have presented that night. Procedurally, does the Board needed to vote on this?

Mr. Sioras stated the Board can either take no action, or, as the applicant's attorney has made a request, the Board can make a motion in the affirmative to reconsider and then vote it up or down.

Ochs withdrew his second to the motion to reconsider.

Ms. Evans stated that the only members present tonight who voted on the prevailing side are herself, Mr. Granese, Mrs. Roach and Mr. Ochs. If the Board makes a motion to reconsider, it indicates the Board intends to change the vote. She has had no indication from any of those members that they feel they have that inclination. That is why she said it should be placed in the file.

Mr. Nelson said when a request from a legal counsel is received, the Board should make a clear decision, especially if it goes to court. That has been the legal advice in the past. Ms. Evans thought that was contrary to legal decisions the Board has received. Mr. Nelson said that in the past they have been advised, when a request like this is received, it is formally disposed by voting it up or down, so that it is on the record as a formal decision. The attorney has indicated it is up to the Board's discretion. With regard to the reconsideration,

based on the content of the applicant's letter, which says they want to give the Board more data, it depends on what the data is. The Board could vote for reconsideration because they have changed their minds, or because they think that if they receive more data, of the right kind, they might change their minds. They don't have to have a predisposition to vote one way or the other. Making a motion is the cleanest way to deal with it, rather than tabling it. Mrs. Roach noted the second to the motion had been withdrawn. No one seconded the motion. Mrs. Roach announced that due to a lack of second on the motion, the Board will take no action on this request and the request will be placed in the file.

#### Next Meeting

Mr. Sioras advised that the Open Space Ordinance would be placed on the agenda for the April 2, 2008 meeting as a workshop item.

#### Mr. Nelson

Mr. Nelson took a moment to say goodbye; this is his last evening with the Board after many years. He has enjoyed working with the Planning Staff and various Boards over the years. He thanked everyone for the opportunity and wished everyone well. Mrs. Roach said the Board would miss him and his knowledge. Mr. Sioras also thanked Mr. Nelson and noted that he has assisted the Planning Office over the years and that has been appreciated. Mr. Chirichielo thanked Mr. Nelson for his dedication and service to the town. He has served at the Planning level for many years and he is wished the best. He will be missed as well as the knowledge he brought to the Board.

### **Public Hearing**

#### **Patrick & Jennifer Cummings 27 Goodhue Road, PID 03026 Amendment to Subdivision Plan Acceptance/Review**

Mr. Sioras provided the following staff report. This plan was approved by the Planning Board in 2005. The request is for fire protection. The regulations allow either a cistern, the home to be sprinkled, or serviced by a fire hydrant. This plan was approved with a sprinkler system. The current application would amend that plan. Chief Klauber of the Fire Department has prepared a memo that is attached to the staff report. He does not have an issue with the change to the plan. The new owner would prefer to use the cistern and this would amend the original plan. If this is approved, he would recommend the surveyor certify that the cistern is within 1000 feet of the lot.

He introduced Wes Aspinwall of Edward Hebert Associates.

Mr. Nelson asked for clarification of Mr. Sioras' comment on the staff report that indicated he cautioned the Board with regard to setting precedent on this application. Mr. Sioras explained that there is a concern as there have been a few of these. The Board requires that notes be placed on the plan describing the fire suppression for the lots. He has spoken with Fire Prevention, who signed off on the original plan. The new builder does not want to put in a sprinkler system. The concern is that the plan was approved with sprinklers required. This application is to change that note. The bottom line is fire protection. The distance can be certified to the cistern. But the issue is whether or not it is feasible to install a sprinkler system rather than not wanting to do it. Issues like this can be remedied with the new permit system. Mr. Sioras explained how the new permitting system will work.

Mr. Nelson inquired if the plan has been built. Mr. Sioras reported the home is built. Mr. Nelson confirmed that the builder did not follow the plan and now wants the blessing of the Board. Mr. Sioras explained that was his point with regard to setting a bad precedent.

Wes Aspinwall provided a history of the lot. This subdivision was approved by the Planning Board in December of 2005. There is a large parcel of land that went across the town line into Windham. There are 150-200 acres in Windham. This piece is in Derry and is an isolated 3.1 acre lot. This was all one parcel prior to the subdivision. They subdivided and put the rear line on the town line. This was done for 40 Acres LLC (Kevin Cyr). The land in Windham has been sold to the Town of Windham and is held in conservation. The approved plan does have a note. This was discussed at TRC with staff and representatives of the Fire Department. Note 7 [approved plan] states, "Lot 03026 to be serviced by individual sprinkler system installed per NFPA 13D upon construction of a house. These requirements will be implemented by the Town of Derry Fire Chief or his designee." This plan was approved, signed and recorded at Rockingham County Registry of Deeds as D-33857, sheet 1 of 4. From that point, the land was sold to Patrick and Jennifer Cummings.

Mrs. Roach inquired if the plan in front of the Board is the new plan? It is. It is the same as the old one with the exception of Note 7 and some extraneous notes for the Town of Windham. The abutter list has also been updated. Mr. Aspinwall advised that the land was sold to the Cummings'. They purchased the one house lot for themselves and built an attractive log cabin on it. This is more like a ZBA case. Mr. Cummings took the deed which refers to the approved plan but is not a professional builder. Mr. Aspinwall's understanding is that legally that makes the plan part of the deed on conveyance. This is an innocent error and Mr. Cummings missed the point. He obtained a building permit and septic approval and never understood the note and its requirements. This issue was picked up late in the process and now the home is almost complete. The town

and staff has done the right thing by revising the permit system, but now they are in transition. This was an innocent blunder and he got caught.

The second part of this is that one of the options for fire protection under the LDCR is to use a cistern if it is located within 1000 feet. By chance, there is a cistern within 1000 feet that is located in another subdivision. He is not sure if that subdivision plan was approved prior to or after this one. If done prior, this could have been an option for this lot. It ends up that the people regret the blunder. The situation is that in other circumstances the existing fire protection would satisfy the regulations. The Fire Chief and Administration are satisfied that the cistern provides adequate protection for this lot. Therefore they request re-approval of this lot with the modification to Note 7 to read, "Lot 03026 will be serviced by a cistern located just under 1000 feet east of this property on the northerly side of Goodhue Road, for fire protection." He could have put in a cistern if he had known about it prior to construction. This building is a log cabin and construction is different than that of a standard home. The roof is already constructed. To install a sprinkler at this time would be 1 ½ times or more the cost of what it would have been. The owner will have to deconstruct his home. This will cause a hardship. There was no intentional effort to subvert the regulations. Given those circumstances, he hopes the Board will approve the amendment to this plan.

Mr. Ochs inquired if an occupancy permit has been issued. One has not. Mr. Sioras stated he was told by the Building Inspector that one will not be issued until the fire protection issue can be resolved. Mr. Ochs said he could not believe that someone would construct a home without understanding the responsibilities and the plan. He does not see that costing someone money is a reason to change the plan. That is not the Board's problem. He would not support this request.

Mr. Nelson asked for information regarding the cistern in the other subdivision. Mr. Aspinwall advised the cistern has easements to the Town of Derry. Mr. Sioras said there is a similar subdivision down the road with frontage lots that were approved prior. The cistern is operational and the homes are occupied. The LDCR allows a cistern or sprinklers. Mr. Nelson inquired why the travel distance to the cistern is not shown on the plan so that it can be shown it is not more than 1000 feet? Mr. Aspinwall stated he did survey it and gave that information to the Fire Chief. Mr. Nelson said it needs to be on the plan. Mr. Sioras suggested if the Board approves this plan, he would like to see the distance certified on the plan. Mr. Aspinwall said it was just under 1000' to the east of this property. Mrs. Roach said she would want to see the cistern on the plan. Mr. Nelson asked that the distance be added as well. Mr. Aspinwall explained the location and advised it is 998 feet from this property and within the capacity of the Fire Department.

Mr. Nelson noted the 1000 foot figure came from the fact that each station has 1000 feet of hose in the bay. He noted this is an after the affect remedy. These are the choices if the lot is not near a hydrant. He is not sure it serves the public interest to be punitive. He does not see that it serves the public interest to tear down the home. Since there is a new permitting system in place and this will not happen again in the future, he would suggest letting this one go.

Mr. MacEachern said he was not inclined to be punitive or as generous. The applicant and the surveying firm should have known all of these things were there. This should have been part of the services provided by the engineer to note the cistern on the first plan.

Mr. Sioras explained this was a one lot subdivision, not a traditional subdivision. 99% of the parcel is in Windham. Only 3 acres were in Derry. By coincidence, the area in Derry met the lot and frontage requirements for the zone and they were able to come forward with a one lot subdivision. The permitting was not an error on the part of the Building or Fire Departments. The builder was advised of this requirement months ago and chose not to put in a sprinkler.

Mr. MacEachern thought it was a case of there was a choice between a cistern within 1000 feet and a sprinkler system. The original plan chose a sprinkler. Mr. Sioras said this owner chose to not go with the sprinkler and Mr. Aspinwall provided the option of the cistern as a solution. Mr. MacEachern asked if the cabin was built without regard to the sprinkler system? Mr. Sioras said when the applicant came in for the final occupancy permit, the sprinkler system was not installed. Mr. MacEachern noted that during the original process, no cistern was acknowledged on the plan. The house is built. He would like to see a cistern in the front yard. The options would be to install a sprinkler system or construct a 1000 gallon cistern in the yard. That option would assist with fire protection down Goodhue Road.

Mr. Aspinwall understood something different than what has come across. Who was the 'developer' that did not want to do this? Mr. Sioras said it was Mr. Cummings. Mr. Aspinwall said he understood that Mr. Cummings was not aware of the requirement for a sprinkler and this is an issue because it was not initially caught by the Building Department. It was caught late in the process. He has been told this by Mr. Cummings and the Building Inspector; he was not there first hand. This was picked up late in the process and not noted during inspections and the sprinkler system was not asked for until the house was near completion.

Mr. MacEachern noted the original plan was approved with a sprinkler and it is on record. He agrees it is not this Board's job to make up for someone's mistake. The plans clearly required a sprinkler system. The house was built without a sprinkler. Maybe it was missed by the town but the house needs fire protection. He is willing to say the applicant doesn't need piping in a log cabin

but then the applicant needs a cistern. There is not one 50 feet away. The distance is right on the edge of 1000 feet.

Mr. Aspinwall said he certified the distance to the Fire Department, which is the basis of the Fire Chief's letter to the Board. He said this Board does not want to be in the position to correct mistakes. A mistake was made, but there is an alternative. By chance, the applicant falls within the regulation. He asks the Board to consider the Fire Department views this as an alternative solution. It is allowed by the LDCR and he would ask the Board to amend the plan. This lot is a residue piece in Derry. If someone had come and built on this lot prior to the subdivision, fire protection would not have been an issue. The fire protection is a function of the subdivision. He does not believe this issue came to light until it was so late in the process that it would require considerable destruction of the home. He does not believe anyone said they did not want a sprinkler system. The owner may have made a mistake and he may have to do some things to correct it.

Mr. Nelson asked if there is anyone who has firsthand knowledge of who said what? It would make a difference to him if the applicant knew about this when he went to pull a permit, or if it was not noticed until late in the process. Mr. Sioras reported he was told by staff that the individual was put on notice at the front counter at the time of the permit and by the Fire Department.

Mr. Granese said he has a sprinkler system in his home. He agrees with the comments but fingers don't need to be pointed. He assumes the ball was dropped. He would like to know if the Fire Department went out and looked at this. He would like to see a certified letter from the Fire Department saying they went out and looked at it. He would rather have a sprinkler system in a house at that distance. If there is a problem with the fire hose [during an emergency], that will become an issue. Mr. Aspinwall advised Mr. Cummings was present and has firsthand knowledge. There was no one present from the Fire or Building Department.

Mr. Ochs said he is not trying to be punitive. The applicant wants relief from the Board for someone else's mistake. He feels Mr. MacEachern's suggestion is excellent. Is that acceptable to the applicant? Mr. Aspinwall noted this lot has a lot of ledge on it; the road has been recently reconstructed, regraded and planted. Constructing a cistern would require blasting and that would be disturbing to the neighbors.

Mrs. Roach invited public comment.

Mr. Cummings stated he pulled the building permit and was never told about the sprinkler or cistern requirement. Bob Mackey came out for the final and went through everything. One of the Fire Inspectors went through the house two weeks prior and checked the boiler. He did not say anything regarding the



sprinkler or cistern. Mr. Mackey mentioned it to him at the final inspection and he was not even sure if the lot needed it or not. He is not a builder so is not familiar with all the details. He drives a truck for a living. Bob Mackey was the first person to tell him he needed a sprinkler.

Mr. Granese confirmed the home is built. He would suggest the applicant go to the Fire Department and let the Fire Department decide. If the Board says they are okay with a cistern and something happens to the house, the owner is going to come back to the Board. Let the Fire Chief say that he accepts that.

Mr. Nelson said all of these comments have to do with fire safety, but this is a Planning Board regulation. He agrees the distance should be certified and Mr. Aspinwall has measured it. He is hearing conflicting testimony as to when the owner was put on notice. If the town messes up, there is a thing called 'administrative gloss'. The town can't go back later and force the person to comply. Mrs. Roach noted there is no one from the Building Department present to tell the Board the sequence of events. Mr. MacEachern said if the town messes up, fine. But the Board approved a subdivision that said a sprinkler system was required. It is not the town's job when someone pulls a permit to read the results and accept all the Planning Board does. This is a double edged sword. Mr. Cummings reported he did not get a copy of the subdivision plans until Mr. Mackey gave him one.

Ms. Evans wondered why this home can't have a sprinkler system installed? The pipes would be exposed but would be hung and would be serviceable. It will match the approved plan and it can be done.

Mr. Cummings said if he had known, he would have run the pipe through the roof system before it was closed up. He has no problem with a sprinkler system; his problem is being told at the last minute. Ms. Evans said she does not feel they are punishing him. Rules need to be followed.

Mr. Chase inquired who the general contractor was for the construction project? It was Mr. Cummings who indicated all he had for plans were the septic approval which showed the building lot and building envelope. Mr. Chase asked if Mr. Cummings saw the subdivision plans prior? He did not. Mr. Chase asked when Mr. Aspinwall certified the distance to the cistern, did he go as the crow flies, or along the roadway? Mr. Aspinwall said he used the roadway. Mr. Chase asked for the capacity of the cistern [gallons]? Mr. Aspinwall said he did not know. He believes the Fire Department checked that when they looked at the issue in relationship to this building. They do have a formula that they use. Mr. Chase agreed the Department did, but now the applicant wants to add another home to the cistern and is adding a distance. It could make a difference as to whether or not the cistern can handle the extra load. Mr. Aspinwall said the formula takes into consideration the volume of water for a certain square footage of home, and

the distance handled by the hose or tanker. He understands this building is within the capacity normally expected of that cistern.

There was no other public comment.

Mr. MacEachern suggested tabling this hearing and coming back with a certified letter from the fire department with regard to the distance. He has heard concerns regarding the capacity of the cistern at the distance of 1000 feet. That cistern was designed for the other development. It may be undersized for the addition of this lot. He needs to know there are no issues from the Fire Department and would like a document from Mr. Mackey with regard to his discussions with Mr. Cummings as to the order of events and would like to know more with regard to the lot. He still feels it would be better to have a cistern there. One of those items will need to happen. He would prefer not to have the applicant sprinkle the house at this point since the house is done. If the Fire Department and other departments all sign off on the existing cistern, then okay. But if there is no Fire Department sign off, he needs to know if a cistern can be placed in this yard.

Mrs. Roach stated if this hearing is continued, Mr. Mackey should attend the next hearing with his file.

Mr. MacEachern stated he would like to have closure and does not want to cause the applicant undue hardship. He would be willing to table this hearing to April 23, 2008. Ms. Evans stated she had an issue with that. It was pointed out that the Board needed to accept jurisdiction prior to tabling this application.

Motion by MacEachern to accept jurisdiction, seconded by Ochs. The motion passed unanimously.

Motion by MacEachern to table this hearing to April 2, 2008, with the following conditions: a letter is obtained from the Fire Department confirming that the existing cistern can handle the additional capacity of this lot at the distance of 998 feet; documentation is provided from the Building Inspector/Code Enforcement Officer regarding the sequence of events and outlining discussions with the applicant as well as Mr. Mackey attending the next meeting, and documentation regarding the topography of this lot, confirming whether or not it can accommodate a cistern. The motion was seconded by Ochs.

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Chirichiello, MacEachern, Ochs, Chase, Nelson, Granese and Roach voted yes, Evans voted no. The motion passed by a vote of 7-1.

Mrs. Roach advised there would be no additional notification to any of the parties.

**Tessies Too**  
**Gulf Road Extension, PID 04037**  
**Subdivision Amendment 2 Lot Subdivision**  
**Acceptance/Review**

Mr. Sioras provided the following staff report. The purpose of this plan is for a two lot subdivision located on Gulf Road in the Low Density Residential District. All town departments have reviewed and signed the plan. There are no waiver requests, and no state permit is required. Each lot is over five acres in size. He would recommend approval of this subdivision application. The Board previously approved this plan in November, 2004. The approval expired. All revisions have been made to the plan per the original KNA report.

Jim Lavelle presented for the applicant. This plan was approved in late 2004. It is a 10 acre subdivision into 2 lots of about 5 acres each. Road and shoulder improvements are required. The only change to this plan was that they did provide an easement to the town at the brook crossing. This is a 25 foot square easement for fire protection. They have applied for re-approval because the conditions of approval were not met with regard to the bond and road work within the appropriate time frame.

Mr. MacEachern thought this application was pretty straightforward. It was noted that many of the Board members present, voted on it previously.

Mrs. Roach opened the floor for public comment.

Rhonda Moisan, 130 Gulf Road said this was the first she has heard of this development. What was proposed in 2004? She said she did not get a notice in 2004. She has lived at this address since the 1990's. She lives right next to the development. The first she heard about it was when Mr. Wickson walked through her yard. There is a large house behind prime wetland. Blasting affects her house and the stability of her home. She needs to know what is proposed for her neighborhood. Mr. Sioras noted she was noticed in 2004. Mrs. Moisan said she heard of the Gulf Road project, but not Gulf Road Extension. Mr. Sioras explained the applicant submitted a brand new application, but the proposal is the same as in 2004.

Mr. Lavelle explained the plan to Mrs. Moisan. On the plan he provided for demonstration, the land owned by Mr. Wickson is outlined in pink. There is an existing mobile home on the lot that will be removed. There will be 2, five acre lots. He showed the building area for the lot located adjacent to the Moisan's. The second lot will have a much smaller building area. It is not possible to know what style or how large a home will be built on the lots. It is likely Mr. Wickson will sell the lots once they are subdivided. Mr. MacEachern pointed out it will only be two lots. Mrs. Roach said the Board cannot tell the size of the homes;

the lots are not sold yet. Mrs. Moisan said she had a concern that she would be subjected to construction this summer. Mrs. Roach explained the Planning Board does not have control over that or the size of the home that will be constructed on the lot. Mr. MacEachern said it would be whatever fit in the buildable area, keeping in mind that the septic and well will also need to fit in that area. The lot to the left will not have a large home on it, based on the buildable area. Mrs. Roach advised the only item before the Board was the two lot subdivision.

Mr. Lavelle stated he would provide a copy of the plan to Mrs. Moisan.

Motion by MacEachern to accept jurisdiction, seconded by Ochs. The motion passed unanimously.

Motion by MacEachern to approve the plan pursuant to RSA 676:4, III, Expedited Review, with the following conditions: Owner's signature is on the plan, subject to on-site inspection by the Town's engineer; establish escrow for the setting of bounds, or certify the bounds have been set; establish appropriate escrow as required to complete the project; obtain written approval from Doug Rathburn that the GPS disk is received and operable, and that the above conditions are met within six months. The motion was seconded by Ochs.

Chirichiello, MacEachern, Ochs, Evans, Chase, Nelson, Granese and Roach all voted in favor.

Motion by Nelson seconded by MacEachern to adjourn. The motion passed and the meeting stood adjourned at 8:15 p.m.

Minutes prepared by Elizabeth Robidoux, Planning Clerk.